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IN THE

Supreme Court of the United States

OCTOBER TERM, 1937.

No. 262.

UNITED STATES OF AMERICA, *Petitioner*,

v.

GARBUTT OIL COMPANY, a corporation, *Respondent*.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

BRIEF FOR THE RESPONDENT.

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BRIEF FOR THE RESPONDENT.

OPINIONS BELOW.

The memorandum of conclusions handed down by the District Court (R. 51-52) is unreported. The opinion of the Circuit Court of Appeals (R. 85) is reported at 89 Fed. (2d) 749.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered April 28, 1937 (R. 89). The jurisdiction of this court is invoked under Section 240 (a) of the Judicial Code, as

amended by the Act of February 13, 1925. Petition for a writ of certiorari was granted October 11, 1937.

QUESTIONS PRESENTED.

(1) Whether a duly filed claim for refund of an overpayment of income taxes, in which specific grounds are stated, may be amended after the statutory period has expired, *but before the Commissioner of Internal Revenue has acted upon the original claim,* to state a new ground in support of the refund.

(2) Whether, in considering on their merits grounds and contentions set forth for the first time in an amendment to a timely claim for refund, which amendment was filed after the expiration of the statutory period but before the Commissioner acted upon the original claim, the Commissioner waived any defects in or objections to the claim for refund.

STATUTES INVOLVED.

The statutes and regulations involved are contained in the appendix hereto.

STATEMENT OF FACTS.

This action was filed in the United States District Court for the recovery of income and excess profits taxes overpaid by respondent for the year 1919. The only issue now presented is whether the action was based upon a proper claim for refund.

Respondent, a California corporation, was organized in 1907, and on October 3, 1907 acquired a lease of certain oil property. Oil was discovered and thereafter, including the entire year 1919, the only business engaged in by respondent was the production and disposition of oil from this property (Stipulation of Facts VIII, R. 49; Findings of Fact VII, R. 66).

On April 10, 1911 respondent, by its Board of Directors, duly adopted a resolution providing in effect that all oil

produced by respondent after January 1, 1911 should be assigned to respondent's lessors under the lease to the extent of their royalty interests and to respondent's stockholders to the extent of their holdings of stock, *pro rata*, in kind, so long as the stockholders should pay calls for money necessary to cover all expenses of respondent. That resolution remained in full force and effect at all times subsequent to April 10, 1911 to and including the entire year 1919 (Findings of Fact VIII, R. 66; Stipulation of Facts IX, R. 49, 50).

Thereafter respondent distributed the oil in kind, as it was produced, to its lessors and stockholders in accordance with their respective interests as provided in said resolution (Findings of Fact VIII, R. 66). As all the oil produced by respondent was distributed in kind it realized no income therefrom (Conclusions of Law IV, R. 68) and as its only activity was the production of oil respondent had no taxable income whatsoever during the year 1919.

Due to a misconception of the law, respondent believed that it realized income from the production of the oil and in its income and excess profits tax return for the year 1919 respondent reported net income in the amount of $16,928.61 and a tax liability for said year of $2,072.68 which tax was paid during the year 1920 (R. 53). Thereafter the Commissioner of Internal Revenue determined and assessed an additional tax of $3,105.65 against respondent for said year (Findings of Fact III, R. 54). Respondent paid said additional tax of $3,105.65 on April 3, 1925 (Findings of Fact IV, R. 54).

On March 30, 1929 respondent filed with the Collector of Internal Revenue at Los Angeles, California, its claim for refund on Form 843 of income and excess profits taxes overpaid by it for the year 1919 in the amount of $3,105.65 (Findings of Fact V, R. 54). In said claim for refund respondent contended (1) that it was entitled to an additional deduction for the amortization of the cost of a certain drilling contract, and (2) that its invested capital as determined

by the Commissioner of Internal Revenue for excess profits tax purposes was understated by reason of the failure to include therein the unrecovered value of the said drilling contract. Respondent stated the facts in support of these contentions (Findings of Fact V, R. 54-62). On May 31, 1929, while the claim for refund of March 30, 1929 was being considered by the Commissioner of Internal Revenue, respondent filed a duly sworn statement entitled "Statement of Garbutt Oil Company, Los Angeles, California, for the Purpose of Perfecting and Completing Claim for Refund Covering Alleged Overpayment of Income Tax for the Calendar year 1919". In said statement of May 31, 1929 respondent set forth as an additional reason in support of its claim for refund that because of the distribution of its oil in kind respondent had realized no taxable income during the year 1919 and set forth the additional facts in support of this additional contention (Findings of Fact VI, R. 62-65).

The Commissioner of Internal Revenue undertook to treat the supplemental statement of May 31, 1929 as a valid amendment of respondent's original claim for refund filed on March 30, 1929 and undertook to consider on their merits the contentions and grounds advanced by respondent in said supplemental statement of May 31, 1929 (Findings of Facts VI, R. 66), and on August 12, 1929 the Commissioner sent to respondent a letter notifying respondent that its claim for refund would be rejected. In regard to respondent's contention that it realized no taxable income in 1919 the Commissioner stated in said letter of August 12, 1929—"This office holds that the distribution of oil in excess of the expenses contributed represents a distribution of profits which are taxable to the corporation" (Findings of Fact VI, R. 66; Stipulation of Facts, V, R. 48; Complaint, Ex. D, R. 37).

On November 13, 1929 the Commissioner of Internal Revenue sent to respondent another letter notifying respondent that its claim would be rejected. In said letter of November 13, 1929 the Commissioner stated that the supplemental

statement of May 31, 1929 would not be considered as an amendment to the original claim as it was filed after the expiration of the statutory period of limitation (Stipulation of Facts VI, R. 48; Complaint, Ex. E, R. 39). The Commissioner formally rejected respondent's claim on November 21, 1929 (Stipulation of Facts VII, R. 48).

Respondent filed suit in the United States District Court for the Southern District of California for the recovery of said overpayment of taxes for the year 1919. In its complaint respondent alleged as grounds for recovery the facts and contentions contained in its original claim of March 30, 1929 and those contained in its supplemental statement of May 31, 1929 (R. 7-42).

The District Court concluded that respondent realized no taxable income during the year 1919 from the production and distribution of oil (Conclusions of Law IV, R. 68) but further concluded that the supplemental statement of May 31, 1929 did not constitute an amendment to respondent's original claim for refund filed on March 30, 1929 (Conclusions of Law I, R. 67), and since said supplemental statement was filed after the expiration of the statutory period, and since the grounds upon which recovery could be based were first stated in the supplemental statement, respondent was not entitled to recover (Conclusions of Law II, III and V, R. 67 and 68). Upon these conclusions judgment was rendered for the United States.

The Circuit Court of Appeals determined that the amendment to the claim for refund filed May 31, 1929 was a proper amendment to the original claim for refund filed March 30, 1929 and reversed the judgment of the District Court (R. 88).

SUMMARY OF ARGUMENT.

I. The statutes which provide for the refund of taxes erroneously collected impose no requirements or conditions in regard to the form or contents of claims for refund. The statutes merely require that a claim be filed with the Commissioner of Internal Revenue within a specified period.

The requirements in regard to the form and contents of claims for refund are set forth in the regulations and rulings of the Commissioner of Internal Revenue. The purpose of the regulations is to facilitate research in the investigation of the claim and a timely claim which does not comply with the regulations may be amended to do so after the expiration of the period for filing new claims, provided the amendment is made before the claim is acted upon by the Commissioner and is not inconsistent with the original claim.

In the case at bar the statute was complied with in that a claim for the full amount sought to be recovered was filed before the expiration of the statutory period and the regulations were complied with in that the specific grounds for recovery were fully set forth in an amendment which was filed with the Commissioner before he had acted upon the original claim. Also the original claim and the amendment were treated by the Commissioner as one claim and the grounds alleged in the amendment were considered on their merits.

II. The requirements of the regulations in regard to the form and contents of claims for refund may be waived by the Commissioner of Internal Revenue either expressly or impliedly. In the case at bar in treating the original claim and the amendment as one claim, and in considering on their merits the grounds and contentions stated by respondent in the amendment, the Commissioner waived the defect of the original claim which resulted from the failure to set forth all the grounds relied upon by the claimant.

ARGUMENT.

I.

The Amendment to the Claim for Refund, Being Filed Before the Commissioner of Internal Revenue Acted Upon the Original Claim, Was Proper and Timely.

This action was filed in the United States District Court for the recovery of $3,105.65 of the income and excess profits taxes overpaid by respondent for the year 1919, which was paid on April 3, 1925. The action was based upon a claim for refund which was filed on March 30, 1929 (R. 54) within the time provided by statute and an amendment which was filed on May 31, 1929 (R. 62-65) after the expiration of the period within which a new claim could have been filed but while the original claim was still under consideration by the Commissioner of Internal Revenue. The original claim asked for the refund of $3,105.65 on the grounds that respondent was entitled to an additional deduction for leasehold amortization and that respondent's invested capital had been understated (R. 54). The amendment to the claim alleged that respondent realized no taxable income during the year 1919 and asked for the refund of such amount as could be legally refunded (R. 62-65). In a letter dated August 12, 1929 the Commissioner notified respondent that its claim would be rejected and in said letter he discussed the merits of the contentions advanced by respondent in the amendment as well as in the original claim (R. 37, 48, 66). No mention was made of the fact that the amendment was filed after the expiration of the statutory period. In a letter dated November 13, 1929 the Commissioner again notified respondent that its claim would be rejected and in this letter he stated that respondent's contentions advanced in the amendment would be rejected because the amendment was filed too late (R. 39, 48). The claim was formally rejected on November 21, 1929 (R. 48). Within the time provided by law respondent filed this action in the District Court and

alleged the grounds advanced in the orginal claim and the amendment (R. 7-42). The District Court found that respondent had no taxable income for the year 1919 but further held that the amended clam was not timely filed and that the action was therefore not based upon a proper claim for refund (R. 67, 68) and rendered judgment for the United States (R. 69). On appeal by respondent the Circuit Court determined that the amendment was proper and timely and reversed the judgment of the District Court. Thus the overpayment of the tax is now admitted and the only issue here presented is whether the action is based upon a proper claim for refund and that issue depends upon whether the amendment was proper and timely, or if not, whether the Commissioner, in considering on their merits the contentions presented in the amendment, waived the defect of the original claim in not stating the facts in regard to this contention.

The original claim for refund and the amendment complied with the requirements of the statutes and the regulations.

The general question presented in the case at bar, namely, when and to what extent a timely claim for refund of income taxes may be amended after the expiration of the period of limitations for the filing of a new claim but before the original claim has been acted upon by the Commissioner of Internal Revenue has been considered by this court in several comparatively recent cases.

United States v. *Memphis Cotton Oil Co.* (1933), 288 U. S. 62; 53 S. Ct. 278, 77 L. Ed. 619;
United States v. *Henry Prentiss Co.* (1933), 288 U. S. 73; 53 S. Ct. 283, 77 L. Ed. 626;
United States v. *Factors & Finance Co.* (1933), 288 U. S. 89; 53 S. Ct. 287, 77 L. Ed. 633;
Bemis Bros. Bag Co. v. *United States* (1933) 289 U. S. 28; 53 S. Ct. 454, 77 L. Ed. 1011;
George Moore Ice Cream Co. v. *Rose* (1933), 289 U. S. 373; 53 S. Ct. 620, 77 L. Ed. 1265.

In all of the above cases except *United States* v. *Henry Prentiss Co.*, (*supra*), this court held that the amendment after the expiration of the statutory period was timely and proper. The facts in the case at bar, however, are not identical with the facts in any of the cases decided by this court. Petitioner contends that the case at bar comes within the rule of the *Prentiss* case. The court below held and respondent contends that the case at bar comes within the rule of *United States* v. *Memphis Cotton Oil Co.* and the other cases in which the amendment was held to be proper and timely.

In *United States* v. *Memphis Cotton Oil Co.* (*supra*) and the other cases cited above this court pointed out that in determining whether an amendment is timely and proper the purpose of the statutes and the regulations and the practice in the administrative review of claims must be kept in mind.

The applicable statutes are Section 284 (a) and (b) of the Revenue Act of 1926 (printed in full in appendix) and Section 3226 of the Revised Statute as reenacted in Section 1113 of the Revenue Act of 1926 (printed in full in appendix). The applicable provision of the Regulations is Article 1254 of Regulations 74 (printed in full in appendix).

Section 284 (a) and (b) of the Revenue Act of 1926 provides for the refund of taxes overpaid if a claim therefor is filed by the taxpayer within the period stated, which period with respect to taxes for 1919 was four years from the time the tax was paid. The amount of the refund was also limited to the tax paid within the four years preceding the filing of the claim.

Section 3226 of the Revised Statutes as reenacted in Section 1113 of the Revenue Act of 1926 (printed in full in appendix) provides that no suit shall be maintained for the recovery of an internal revenue tax erroneously or illegally collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provision of law in that regard, and the regulations

of the Secretary of the Treasury established in pursuance thereof.

Regulations 74, Article 1254 (printed in full in appendix) pertaining to claims for refund provides among other things that the claim must set forth in detail under oath each ground upon which a refund or credit is claimed, and facts sufficient to apprise the Commissioner of the exact basis thereof.

The statutes make no provision in regard to the form of the claims. They merely require the filing of a claim with the Commissioner within the limitation period and require that a subsequent action in court must be based upon a claim filed. The purpose of the statutes is clearly to provide a limitation period, the expiration of which closes all dispute in regard to the correct tax liability for the period involved and to further provide the Commissioner with the opportunity to consider the claims of the taxpayer and correct mistakes prior to litigation and thereby avoid litigation in cases in which he is satisfied that the tax has been overpaid.

Nichols v. *United States*, 7 Wall. 122, 19 L. Ed. 125;
United States v. *Felt & Tarrant Mfg. Co.* (1931) 283 U. S. 269, 51 S. Ct. 376, 75 L. Ed. 1025;
Continental-Illinois National Bank & Trust Co. v. *United States* (CCA-7, 1932) 67 F. (2d) 153;
Dascomb v. *McCuen* (CCA-2, 1934) 73 F. (2d) 417.

In the case at bar the requirements of the statutes were fully complied with by respondent. A written claim for refund for the full amount of the taxes sought to be recovered was filed with the Commissioner of Internal Revenue within the time provided by law. The Commissioner was given timely notice that the taxpayer contended that its taxes had been overpaid in the amount now sought to be recovered and the Commissioner had full opportunity to correct the error and close the matter without litigation. The Commissioner determined that respondent's claim was not meritorious and rejected the claim. Thereafter, and

within the time provided by law, respondent filed its action in the United States District Court in which it relied entirely upon grounds and contentions which had been presented to and considered by the Commissioner and rejected by him. This is not a case in which the grounds for recovery were presented for the first time in court.

The only provision in regard to the form and contents of claims for refund is contained in the Regulations (Regulations 74, Article 1254). This court has stated that "The function of the regulation is to facilitate research." *United States* v. *Memphis Cotton Oil Co.* (1933), 288 U. S. 62; 53 S. Ct. 278, 77 L. Ed. 619; *Tucker* v. *Alexander* (1927) 275 U. S. 228, 48 S. Ct. 45, 72 L. Ed. 253. Certainly if the Commissioner is to properly consider claims for refund he must be apprised of the facts upon which the claims are based and the claimant should furnish those facts in the form provided by the Commissioner. Furthermore, the Commissioner is clearly justified in denying a claim if the facts upon which it is based are not furnished to him. However, the statement of facts is not the claim and should not be confused with it. The claim is that a particular tax has been overpaid. The facts are merely the basis for the claim. A claim which states no facts at all is nevertheless a claim within the meaning of the law. It may be subject to rejection for formal defects but it is nevertheless a valid claim which may be perfected after the expiration of the statutory period for filing claims. If the claim is perfected before it is acted upon, the fact that the requirements of the regulations were not complied with before the statute expired does not preclude recovery. *United States* v. *Memphis Cotton Oil Co.* (*supra*); *Tucker* v. *Alexander* (*supra*).

Likewise, the consideration of a claim is not limited to the facts and grounds stated therein. The facts stated may clearly show that income has been included in the return which was not legally taxable or that the taxpayer failed to take deductions to which he was entitled by law but if in-

vestigation of other facts not included in the claim discloses other errors which establish that regardless of the error asserted by the taxpayer the total tax paid was not in excess of that legally due no refund is allowable.

Lewis v. *Reynolds* (1932) 284 U. S. 281, 52 S. Ct. 145, 76 L. Ed. 293.

The issue presented by a claim for refund is not merely whether a particular receipt was income or whether a particular expense was allowable as a deduction, but whether on all the facts the tax for the period involved was overpaid. *Lewis* v. *Reynolds* (*supra*). When a claim for refund is filed all the facts pertaining to the period involved are open to investigation in order that it may be determined whether the tax for that period has been overpaid. As stated by this court in *United States* v. *Memphis Cotton Oil Co.* (1933), 288 U. S. 62, 70; 77 L. Ed. 619, 624:

> "***No matter though the claim for refund be specific and limited, the Commissioner is at liberty to audit the return afresh and to strike a new balance as the facts may then appear. Commonly, though, it seems, not always, a general audit will be necessary or will be at least a wise precaution, whether the claim is broad or narrow, if the government is to have the benefit of any compensating adjustments. There is little doubt that this conception of duty and of prudence has had recognition and emphasis in administrative practice."

If the investigation of a claim for refund discloses that the tax was not overpaid, no refund is allowable regardless of the merits of the grounds and contentions stated in the claim. Likewise, if the investigation discloses that the tax has been overpaid, the overpayment should be refunded regardless of whether the original claim contained the facts which eventually establish the overpayment, particularly when during the period of investigation the claimant has specifically presented the facts which establish the overpayment.

If the purpose of the regulation is to facilitate research and to assist the Commission in investigating the return, it cannot make any material difference whether the facts are furnished before or after the expiration of the period for filing the claim as long as they are furnished before the investigation is completed. The Commissioner certainly suffers no hardship or disadvantage if the facts and grounds are presented to him while he is investigating the claim and while he still has opportunity to consider the facts upon their merits.

The purpose of the regulations was likewise fully satisfied in the case at bar. The Commissioner had timely notice that respondent contended that taxes paid by it for the year 1919 were erroneously and illegally collected. While the claim of the taxpayer was being investigated an amendment was filed which merely stated a further reason in support of respondent's claim. This amendment was received by the Commissioner and the facts and contentions therein were investigated and considered along with the facts alleged in the original claim. The Commissioner treated the original claim and the amendment as one claim. In his letters to respondent in regard to the claim (R. 37, 39, 42) the Commissioner referred to respondent's "claim for refund" and in his letters he considered the facts and contentions in both the original claim and the amendment. No objection was made to the fact that the amendment was filed after the expiration of the period for filing new claims until after the contentions presented in the amendment had been fully considered by the Commissioner and he had notified respondent of his determination in regard thereto.

The facts in this case show clearly that the purpose of the regulations was fully satisfied and that the Commissioner was in no way inconvenienced or hindered in his research by the late filing of the amendment.

Respondent submits that the amendment to its claim for refund was proper and timely and that the claim as amended fully complied with the requirements of the stat-

utes and the regulations and furnished a proper basis fo the action in the District Court.

Petitioner contends that the amendment herein pre sented a new cause of action and therefore was not a prope amendment after the expiration of the statutory period fo filing a new claim. The courts and the Board of Tax Ap peals have consistently held that there is only one caus of action in regard to the tax for any particular period an that is whether the disputed tax is erroneous. The partic ular ground alleged to support the contention that the dis puted tax is erroneous is not the cause of action.

Lewis v. *Reynolds* (1932), 284 U. S. 281, 53 S. Ct. 145 76 L. Ed. 293;
Bowe-Burke Mining Co. v. *Willcuts* (D. C. Minn 1930) 45 F. (2d) 394;
Bertelsen v. *White* (D. C. Mass. 1932) 58 F. (2d 792, aff'd. (CCA-1, 1933) 65 F. (2d) 719;
Chicago Junction Railways v. *United States* (Ct. Cls 1935) 10 F. Supp. 156;
Rieck v. *Commissioner,* 35 B. T. A. 1178.

In the recent case of *Edward E. Rieck* v. *Commissioner* 35 B. T. A. 1178, there was presented to the Board of Ta Appeals the question of whether a petition which set fort a specific ground could be amended after the expiration o the period for filing petitions to state another specifi ground. The Board of Tax Appeals held that the cause o action in an action before the Board was not the particula ground alleged but the correct tax liability for the perio in question and that the amendment was permissible an related back to the time the original petition was filed.

Likewise, in the case at bar, the cause of action, if tha term may be properly used in connection with a claim fo refund, was whether the tax had been overpaid. Both th grounds of the original claim and those of the amendmen support respondent's claim that its tax was overpaid. Th amendment did not present a new cause of action bu merely presented a new theory or ground of recovery an

perfected the original claim to include the additional theory. Such an amendment is generally permitted under modern liberal rules of pleading especially where it does not result in hardship to the other party.

The amendment to the claim for refund was proper and timely under the rule of the decisions of this court.

Petitioner contends that the case at bar comes within the rule of *United States* v. *Henry Prentiss Co.* (1933), 288 U. S. 73; 53 S. Ct. 283, 77 L. Ed. 626; *United States* v. *Richards* (CCA-6, 1935) 79 F. (2d) 797; certiorari denied 296 U. S. 718; *New York Trust Company* v. *United States* (CCA-2, 1937) 87 F. (2d) 889; certiorari denied July 1, 1937; *Bryant Paper Co.* v. *Holden,* 63 Fed. (2d) 370; certiorari denied 290 U. S. 631; and *Swedish Iron & Steel Corporation* v. *Edwards* (D. C. N. Y. 1932) 1 F. Supp. 335. Respondent submits that the facts and issues in the above cases are so different from the facts in the case at bar that the cases are clearly distinguishable and do not support petitioner's contentions herein. Respondent also submits that the case at bar comes within the general rule established by *United States* v. *Memphis Cotton Oil Co.* (1933), 288 U. S. 62; 53 S. Ct. 278, 77 L. Ed. 619, *George Moore Ice Cream Co.* v. *Rose* (1933), 289 U. S. 373; 53 S. Ct. 620, 77 L. Ed. 1265, *Bemis Bros. Bag Co.* v. *United States* (1933), 289 U. S. 28; 53 S. Ct. 454, 77 L. Ed. 1011, and *United States* v. *Factors & Finance Co.* (1933), 288 U. S. 89; 53 S. Ct. 287, 77 L. Ed. 633 and comes directly within the rule of *Youngstown Sheet & Tube Co.* v. *United States* (Ct. Cls. 1934) 7 F. Supp. 290, certiorari denied 293 U. S. 599; *Con P. Curran Printing Co.* v. *United States* (Ct. Cls. 1936) 15 F. Supp. 153; certiorari denied 57 S. Ct. 788. See also *Staton* v. *United States* (D. C. Okla. 1935) 9 F. Supp. 428; *Marks* v. *United States* (D. C. N. Y. 1937) 18 F. Supp. 911; *Edward E. Rieck* v. *Commissioner,* 35 B. T. A. 1178.

The facts in *United States* v. *Prentiss* (*supra*) are very different from the facts in the case at bar. In that case the taxpayer in its original return requested a special assessment under the provisions of Sections 327 and 328 of the Revenue Act of 1918. Those sections afforded relief to taxpayers who due to abnormal conditions in their business would be forced to pay an abnormally high tax if the tax were computed in the ordinary manner provided by the law. The granting of such relief by special assessment was discretionary with the Commissioner and his action in this regard was not reviewable by the courts except in case of fraud or other irregularities. Before a request for such relief would be considered it was necessary that the statutory tax be definitely determined and agreed upon. The taxpayer in *United States* v. *Prentiss* (*supra*) was so notified by the Commissioner and apparently acquiesced in the computation of the statutory tax. After the Commissioner had reviewed the taxpayer's request for special assessment and had notified the taxpayer that the request would not be allowed, and after the time had expired for filing a new claim for refund, the taxpayer amended its claim in which it contended that its invested capital had been erroneously computed and that the tax which had been assessed and collected under the statutory method was erroneous. In passing upon the validity of the amendment this court pointed out that in requesting a special assessment the taxpayer had necessarily abandoned any claim that it might have had that the computation of the statutory tax was erroneous. The original claim admitted the correctness of the statutory tax and asked for discretionary relief. The amendment was a complete departure from the original claim and attempted to convert a request for discretionary relief into a claim of statutory error. This court held that the amendment was such a complete metamorphosis of the original claim that it could not be considered an amendment thereof. Furthermore, the original claim, instead of requiring or suggesting a reaudit of the statutory tax lia-

bility, admitted that it was correctly computed, while the amendment was based upon the contention that the statutory tax was erroneously computed and required a reaudit.

In the case at bar there is no such conflict or inconsistency between the original claim and the amendment. Both claims were based upon statutory grounds and in neither was there any request for discretionary relief. Both the original claim and the amendment required a reaudit of the tax return and the income of the taxpayer. Neither were the grounds and contentions in the amendment in any way inconsistent with the grounds and contentions in the original claim. All of the contentions could have been consistently urged in one claim and were presented in the complaint to the District Court. It is true that the original claim did not challenge the correctness of the computation of respondent's gross income but that omission did not constitute an admission that the gross income was correctly computed or an abandonment of any contentions in that regard. In order to properly rule on respondent's original claim the Commissioner should have reaudited respondent's gross income to determine whether it had been fully stated. If he had found the gross income understated he certainly would and should have determined that there had been no overpayment of tax even though respondent's claim for additional deductions had been determined to be valid. Likewise, respondent's contention in the amendment that it had no income was not inconsistent with its contention in the original claim that it was entitled to additional deductions. Taxpayers who have no taxable income frequently have expenses which would be deductible if they had income. Respondent submits that the facts and the issue in the case at bar are in no way comparable to the facts and issue which this court considered in *United States* v. *Prentiss* (*supra*) and that the rule of that case has no application to the case at bar.

Petitioner also relies on *New York Trust Company* v. *United States* (CCA-2, 1937) 87 F. (2d) 889, certiorari de-

nied July 1, 1937, *United States* v. *Richards* (CCA-6, 1935) 79 F. (2d) 797, certiorari denied 297 U. S. 718, *Bryant Paper Co.* v. *Holden*, 63 Fed. (2d) 370, certiorari denied 290 U. S. 631, and *Swedish Iron & Steel Corporation* v. *Edwards* (D. C. N. Y. 1932) 1 F. Supp. 335. Each of those cases is clearly distinguishable from the case at bar. In *United States* v. *Richards* (*supra*), *New York Trust Company* v. *United States* (*supra*) and *Swedish Iron & Steel Corporation* v. *Edwards* (*supra*) the courts expressly found that the original claims had been rejected *before* the amendments were filed. It is well established that a claim cannot be amended after the statutory period has expired and after the claim has been rejected. Also in *United States* v. *Richards* and *New York Trust Company* v. *United States* the amendment sought deductions for certain taxes paid by partnerships of which the taxpayers were members and thus required an investigation of the affairs and records of new and entirely separate taxpayers. In *New York Trust Company* v. *United States* (*supra*) the court stated (87 F. (2d) 891):

> "When the amendment requires examination of the records of another taxpayer, we think that inquiry is forced into paths too far removed from those to which the original claim directed it. We agree with the view expressed by the Sixth Circuit in the Richards case."

In the case at bar both the original claim and the amendment related only to affairs of the taxpayer and required no examination or inquiry into the records or affairs of any other taxpayer or entity.

In *Bryant Paper Co.* v. *Holden* (*supra*) the alleged amendment was filed as a new claim and did not seek to relate itself to the original timely claim.

In the case at bar the amendment was clearly and definitely intended as an amendment of the original claim. Furthermore, it was received and treated by the Commissioner as an amendment of the original claim, the amend-

ment was filed while the original claim was still under investigation and prior to any notice of determination or action by the Commissioner; and the Commissioner considered the contentions advanced in the amendment on their merits.

The case at bar is more nearly analogous to and comes within the general rule of *United States* v. *Memphis Cotton Oil Co.* (1933), 288 U. S. 62, 53 S. Ct. 278, 77 L. Ed. 619 and *George Moore Ice Cream Co.* v. *Rose* (1933), 289 U. S. 373, 53 S. Ct. 620, 77 L. Ed. 1265, in that the amendment was filed while the investigation of the original claim was still in progress; the issue raised by the amendment was within the scope of the investigation required or suggested by the original claim, the contentions presented in the amendment were in no way inconsistent with the contentions advanced in the original claim and the Commissioner treated the amendment as a valid amendment and considered the contentions advanced therein on their merits.

In *George Moore Ice Cream Co.* v. *Rose* (1933), (*supra*), the taxpayer's original claim for refund alleged error in the determination of its invested capital for excess profits tax purposes and set forth the particular assets which it contended had been overvalued. The claim further stated "The original return for this year reflected a loss of $21,047.25. The agent made adjustments to reflect taxable gain of $16,940.18—a difference of $37,897.43. If the audit now being made reflects a different result it will be submitted as additional evidence."

After the statutory period had expired a detailed statement was filed showing the items entering into and making up net income. The Supreme Court held that the amendment was proper and being filed before the claim was rejected was timely.

Respondent's contentions are also supported by the following decisions of lower courts:

Youngstown Sheet & Tube Co. v. *United States* (Ct. Cl.), 7 F. Supp. 290; certiorari denied 293 U. S. 599;

Con. P. Curran Printing Co. v. *United States* (Ct. Cl. 1936), 15 F. Supp. 153; certiorari denied 57 S. Ct. 788;
Marks v. *United States*, 18 F. Supp. 911;
Rieck v. *Commissioner*, 35 B. T. A. 1178.

See, also:

United States v. *Humble Oil & Refining Co.* (CCA-5, 1934), 69 F. (2d) 214;
National Park Bank v. *United States* (CCA-2, 1933), 65 Fed. 415;
Staton v. *United States* (D. C. Okla., 1935) 9 F. Supp. 428.

In *Youngstown Sheet & Tube Co.* v. *United States* (*supra*) the original timely claim stated a specific ground for recovery and after the statutory period had expired an amendment was filed in which another specific ground was set forth. The court stated the issue as follows (p. 293):

> "This brings us to the crux of the case: May a claim which assigns a specific ground for recovery (here deductions from gross income) be amended or supplemented, after the statute has run for filing a new claim, but before the Commissioner has finally acted on the original claim, in order to permit a taxpayer to claim additional deductions and thereby secure a greater refund than would have been permitted on account of the specific ground assigned in the original claim?"

After carefully examining and discussing the decisions of this Court, the Court of Claims determined that the amendment was permissible and valid. The government's petition for certiorari was denied. *United States* v. *Youngstown Sheet & Tube Co.*, 293 U. S. 599. The rule of this case was stated with approval in *Staton* v. *United States* (D. C. Okla., 1935), 9 F. Supp. 428, and was again specifically stated and followed by the Court of Claims in *Con. P. Curran Printing Co.* v. *United States*, 14 F. Supp. 638, certiorari denied 57 S. Ct. 788 and in *Andrews* v. *United States*, 17 F. Supp. 980, now pending on certiorari 1937 Term No. 48.

Respondent submits that the amendment to the original claim for refund herein was a valid and timely amendment and that the claim as amended complied with the requirements of the statutes and the regulations and furnished a proper basis for all the issues presented in the suit in the District Court.

II.

In Considering the Grounds and Contentions Advanced in the Amendment on Their Merits, the Commissioner of Internal Revenue Waived Any Defects in or Objections to the Claim for Refund.

It was contended by respondent before the lower courts that even if the amendment was not timely, in considering on their merits the grounds and contentions advanced therein, the Commissioner of Internal Revenue waived his objection that the contentions were not stated in the original claim. The Circuit Court determined that the amendment was proper and timely and did not consider this alternative contention.

As respondent has more fully stated in Part I of this brief, the statutes which provide for the filing of claims for refund of taxes impose no requirements in regard to the form and contents of such claims. The only requirement of the statute is that the claim be filed within the specified time. (Section 284 (a) and (b) of the Revenue Act of 1926 and Revised Statutes, Section 3226, as reenacted in Section 1113 of the Revenue Act of 1926). The requirements in regard to the form and contents of claims for refund are contained in the regulations. (Regulations 74, Article 1254).

The requirements contained in the regulations are for the purpose of apprising the Commissioner of the facts upon which the claim is based and facilitating his research and review of the claim. *United States* v. *Memphis Cotton Oil Co.*, (1933) 288 U. S. 62, 53 S. Ct. 278, 77 L. Ed. 619; *Tucker* v. *Alexander* (1927), 275 U. S. 228, 48 S. Ct. 45,

72 L. Ed. 253. In order that administrative review of claims may be expedited, it is necessary that the Commissioner have the power to prescribe certain reasonable conditions and require compliance therewith. A claim which does not comply with the conditions imposed by the regulations is subject to rejection but it is nevertheless a claim within the meaning of the law. *United States* v. *Memphis Cotton Oil Co. (supra).* Since the requirements imposed by the regulations are for the convenience and assistance of the Commissioner, compliance therewith may be waived by the Commissioner either expressly or impliedly.

> *Tucker* v. *Alexander* (1927), 275 U. S. 228, 48 S. Ct. 45, 72 L. Ed. 253;
> *United States* v. *Memphis Cotton Oil Co.* (1933), 288 U. S. 62; 53 S. Ct. 278, 77 L. Ed. 619;
> *United States* v. *Humble Oil & Ref. Co.* (CCA-5, 1934), 69 Fed. (2d) 214;
> *Reynolds* v. *McMurray* (CCA-10, 1935), 77 Fed. (2d) 740;
> *U. S. Paper Exports Ass'n.* v. *Bowers* (D. C. N. Y., 1934), 6 F. Supp. 735;
> *Weihman* v. *United States* (D. C. Pa., 1933), 4 F. Supp. 155.

In *Tucker* v. *Alexander, supra,* this Court held that the Commissioner might waive the requirements so as to permit a taxpayer to recover in court on a ground not stated in the claim for refund.

In *United States* v. *Memphis Cotton Oil Co., supra,* this Court again pointed out that the Commissioner might waive defects in a claim for refund and further stated that where the defects in form of a timely claim are corrected by amendment, if the Commissioner hears the claim as amended on its merits, the claims become a single indivisible claim, the new being indissolubly welded into the structure of the old. It cannot be denied, and it has been found as a fact, that in the case at bar the Commissioner did consider appellant's claim as amended and did consider on

their merits the grounds and contentions therein. It would seem to follow from the above cases that the claim and the amendment thereby became a single, indivisible claim and that the amendment was indissolubly welded into the old claim. That being true it must follow that appellant's action in court was based upon a proper and timely claim and that the District Court erred in finding otherwise.

In *United States Paper Exports Ass'n.* v. *Bowers* (D. C. N. Y., 1934), 6 F. Supp. 735, the claim was inadequate on its face but from a notation on the claim, apparently made by some one in the collector's office, and from the statements in the rejection letter, it was apparent that the Commissioner was apprised of and had considered the contentions advanced in court. The defendant contended that the claim did not state the same facts relied on in the court action. The court held (p. 739):

> "The claim for refund was understood by the Commissioner to embrace the contention which was passed upon in the motion to dismiss and therefore must be deemed adequate."

In *United States* v. *Humble Oil & Refining Co.* (CCA-5, 1934), 69 Fed. (2d) 214, the court held that the requirements of the regulations in regard to claims for refund could be waived by the Commissioner and that in considering the taxpayer's contentions on their merits the Commissioner did waive objection to the defects in the claim.

In the case at bar respondent filed its claim for refund for $3,105.65, the full amount sought to be recovered, on March 30, 1929, which was within the time provided by law. The only defect in the claim as a basis for the later court action was that it did not state the grounds and facts which established that respondent had no taxable income in the year 1919. This defect was perfected by the amendment which was filed with the Commissioner on May 31, 1929. The Commissioner raised no objection to the filing of the amendment and did not refuse to consider the contentions

therein. On the contrary, he received the amendment, treated the original claim and the amendment as one claim and proceeded to consider the contentions advanced in the amendment on their merits. In his letter to respondent dated August 12, 1929 (R. 37) the Commissioner raised no objection to the amendment but considered all the contentions as though they had been stated in one claim. It was not until his letter of November 13, 1929 (R. 39), which was after the requirements of the regulations had been fully complied with and the Commissioner had considered all the contentions of respondent, that objection was raised to the fact that the original claim did not state the facts in regard to the contention that respondent realized no income in 1919.

Respondent contends that in treating the original claim and the amendment as one claim and in considering on their merits the contentions advanced in the amendment the Commissioner waived the failure of the original claim to set forth the contentions later raised in the amendment. It is true that the Commissioner eventually raised the objection that the original claim did not contain the facts and contentions later relied upon but before such objection was raised the purpose of the requirement in that regard had been fully satisfied. The Commissioner had been fully advised and had considered the contention on its merits. The raising of the objection at that stage was not for the convenience of the Commissioner nor for the purpose of expediting review but solely for the purpose of denying a refund to which the taxpayer was entitled. Respondent submits that the objection of the Commissioner to the form of the original claim came too late since he had already waived the defects. Furthermore, having waived strict compliance with the formal requirements set forth in the regulations, the failure to comply with said requirements cannot be effectively raised as a defense to the action in court to recover the overpayment.

United States v. *Humble Oil & Ref. Co.* (CCA-5, 1934), 69 F. (2d) 740;
Reynolds v. *McMurray* (CCA-10, 1935), 77 F. (2d) 740.

In answer to respondent's contentions in this regard petitioner argues in Part II of its brief herein that, *first*, there was no waiver by the Commissioner and, *second*, that the Commissioner had no power to waive the statutory requirement that a claim be filed within the period fixed by law.

Petitioner defines waiver as an intentional relinquishment of a known right and contends that no waiver was intended by the Commissioner in this case. The intention to relinquish a right need not be express in order to establish a waiver. The intention may be implied from the conduct of the party and will be implied when a party fails to assert a right which he knows he possesses.

Mitchell v. *Kemp & Burpee Mfg. Co.* (CCA-3, 1915) 218 Fed. 843;
Marine Iron Works v. *Wiess* (CCA-5, 1906) 148 Fed. 145;
Champion Spark Plug Co. v. *Automobile Sundries Co.* (CCA-2, 1921) 273 Fed. 74.

There can be no doubt that the Commissioner had knowledge of his right to refuse to consider contentions not set forth in the claim for refund for the rule was not which he himself established. As the requirements of the regulations were for the convenience of the Commissioner in reviewing the claim he had the power to insist on compliance or waive compliance. The failure of the Commissioner to raise the objection that the claim was not in proper form and his action in considering the merits of the claim clearly establish a waiver of his right to demand strict compliance with the regulations and the waiver having been made it could not be withdrawn. *Champion Spark Plug Co.* v. *Automobile Sundries Co. (supra).*

The right of the Commissioner to reject a claim for refund for failure to comply with the requirements of the regulations is analogous to the right of a defendant to demur specially to the form of a complaint in a law action. If the defendant pleads to the merits without having demurred to the complaint he waives his right to demur. *Townsend* v. *Jemison*, 7 How. 706, 12 L. Ed. 880.

Respondent submits that the Commissioner did waive the defect in the original claim by considering the contention not expressly stated therein and that the waiver could not be withdrawn and the objection to the form of the claim effectively asserted after the contention had been investigated and considered. The reason for denial of a claim for failure to state the facts and grounds ceases to exist after the facts and grounds have been considered and ruled upon.

Petitioner's argument to the effect that the Commissioner has no power to waive the bar of the statute of limitations in actions for the recovery of taxes has no bearing upon the issue here presented. Respondent does not contend that the Commissioner in this case waived the statute of limitations. Respondent's contention is that the Commissioner waived the defects in respondent's original claim which it is conceded was filed within the statutory period. Respondent's original claim was for the full amount sought to be recovered. It complied with all the requirements of the law, but it was defective in that it did not set forth all the grounds and facts as required by the regulations. It is the failure of the original claim to comply with the requirements of the regulations that respondent contends was waived by the Commissioner. Petitioner apparently concedes that the Commissioner may waive compliance with the requirements of the regulations. For the reasons set forth and upon the authorities cited above respondent submits that the Commissioner did waive compliance with the requirements of the regulations in the case at bar.

CONCLUSION.

In conclusion respondent submits that:

1. The amendment of May 31, 1929, being filed with the Commissioner before he rejected the original claim was timely filed and was a valid amendment to the original claim filed March 30, 1929.

2. In treating the amendment of May 31, 1929 as a valid amendment and in considering on their merits the contentions and facts stated therein, the Commissioner waived any defects in or objections to the claim for refund as amended and cannot rely on such defects as a defense to the recovery in court.

3. This action is based upon a valid and proper claim for refund and the District Court erred in failing to so find and conclude.

4. The decision of the court below reversing the judgment of the District Court is correct and should be affimed.

Respectfully submitted,

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APPENDIX.

Revenue Act of 1926—Section 284 (a) and (b).

Sec. 284(a). Where there has been an overpayment of any income, war-profits, or excess-profits tax imposed by this Act, the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," approved August 5, 1909, the Act entitled "An Act to reduce tariff duties and to provide revenue for the Government, and for other purposes," approved October 3, 1913, the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, the Revenue Act of 1921, or the Revenue Act of 1924, or any such Act as amended, the amount of such overpayment shall, except as provided in subdivision (d), be credited against any income, war-profits, or excess profits tax or installment thereof then due from the taxpayer, and any balance of such excess shall be refunded immediately to the taxpayer.

(b) Except as provided in subdivisions (c), (d), (e) and (g) of this section:

(1) No such credit or refund shall be allowed or made after three years from the time the tax was paid in the case of a tax imposed by this Act, nor after four years from the time the tax was paid in the case of a tax imposed by any prior Act, unless before the expiration of such period a claim therefor is filed by the taxpayer; and

(2) The amount of the credit or refund shall not exceed the portion of the tax paid during three or four years, respectively, immediately preceding the filing of the claim, or if no claim was filed, then during the three or four years, respectively, immediately preceding the allowance of the credit or refund.

Revenue Act of 1926—Section 1113.

Sec. 1113. (a) Section 3226 of the Revised Statutes, as amended, is reenacted without change, as follows:

> "Sec. 3226. No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue,

according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress. No such suit or proceeding shall be began before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty, or sum, unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates. The Commissioner shall within 90 days after any such disallowance notify the taxpayer thereof by mail."

(b) This section shall not affect any proceeding in court instituted prior to the enactment of the Revenue Act of 1924.

Regulations 74, Article 1254, as amended by T. D. 4265 (Cum. Bull. VIII-1, p. 110).

(1) A claim for refund or credit of any internal revenue tax, or for refund of interest or penalties, erroneously or illegally collected should be made on the form prescribed by the Treasury Department (Form 843), and should be filed with the collector of internal revenue, although a claim will not be considered defective solely by reason of the fact that it is not made on the form or that it is filed with the Commissioner of Internal Revenue. The claim must set forth in detail and under oath each ground upon which a refund or credit is claimed, and facts sufficient to apprise the Commissioner of the exact basis thereof. Any claim which does not comply with the requirements of the preceding sentence will not be considered for any purpose as a claim for refund or credit.

(2) No refund or credit will be allowed after the expiration of the statutory period of limitation applicable to the filing of a claim therefor except upon one or more of the grounds so set forth in a claim or an amendment thereof, filed prior to the expiration of such period.

(3) These regulations shall take effect on May 1, 1929, and shall be applicable to all claims filed on or after such date, and all other regulations are modified in so far as they are inconsistent with these regulations.

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SUPREME COURT OF THE UNITED STATES.

No. 262.—October Term, 1937.

The United States of America, Petitioner, *vs.* Garbutt Oil Company.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[January 3, 1938.]

Mr. Justice Roberts delivered the opinion of the Court.

The issue in this case is similar to that presented in *United States* v. *Andrews, supra,* p. —, decided this day. The action was brought by the respondent in the District Court for Southern California to recover an alleged overpayment of income taxes for 1919. There is no controversy as to the facts found by the trial court. The respondent, a California corporation, acquired a lease of oil property October 3, 1907. April 10, 1911, the directors resolved that all oil produced after January 1 of that year should be transferred in kind to the lessors to the extent of their royalty interest and to the company's stockholders pro rata to their respective holdings, so long as the latter should pay calls for money necessary to defray the company's expenses. The resolution remained in effect to and including the year 1919 and distribution of all oil produced was made accordingly. In its books of account and its return for income tax the respondent recorded at market value the oil produced and treated the difference between that value and the cost of production as income. The Commissioner of Internal Revenue followed the same method in computing taxable income. In its 1919 return the respondent disclosed a net income of $16,928.61 and a tax liability of $2,072.68 which was paid during the year 1920. The Commissioner, as the result of an audit, assessed an additional tax of $3,105.65 which was paid April 3, 1925.

March 30, 1929, within the four year period of limitations prescribed by the applicable statute,[1] the respondent filed a claim for the return of the additional tax so paid, based upon two grounds: first, that the respondent was entitled to an additional deduction

[1] Revenue Act of 1926, Ch. 27, Sec. 284 (a) (b) (1) (2), 44 Stat. 9, 66.

of $12,500 for the amortization of the cost of a drilling contract with Union Oil Company by which the latter, in consideration of $250,000 par value of respondent's stock, agreed to provide expenses of developing the leased oil property, reimbursement to be made only out of oil produced; and, second, that, in respect of excess profits tax, its invested capital had been understated by failure to include the unrecovered cost of the same contract in the sum of $109,375. While this claim was pending, but subsequent to the expiration of the period of limitation, the respondent filed a "Statement of Garbutt Oil Company . . . for the purpose of perfecting and completing claim for refund covering alleged overpayment of income tax for the calendar year 1919." Therein the respondent asserted that it "now develops that a further reason exists in support of" the pending claim since, by distribution of oil in kind, the respondent realized no taxable income during 1919, and that "it therefore follows that even though the specific grounds set forth in the claim for refund are denied said claim should, nevertheless, be allowed in full", for the reasons set forth in the statement. Refund was demanded of the entire tax paid for 1919 ($5,178.33) "or so much thereof as is properly refundable within the statute of limitations." August 12, 1929, the Commissioner wrote the respondent, concerning the merits of the original claim and the amendment, stating that a refund of $3,105.65 would not be allowed but that a hearing could be had upon the proposed rejection if requested in writing. On October 4, 1929, a conference was held but it does not appear whether the merits of the amendment were discussed. November 13, 1929, the Commissioner advised the respondent that the claim would be rejected on the merits and that the new contention embodied in the statement filed would be rejected as it was not referred to in the timely claim and was presented only after the expiration of the period of limitations and after the expiration of the time allowed to perfect informal claims, pursuant to a Treasury decision. Formal rejection of the claim was made November 21, 1929.

The respondent brought suit for the recovery of the $3,105.65 it being admitted that the remainder of the tax paid for the year 1919 could not be recovered because not claimed within the four year period specified in the statute. At the trial the grounds of the refund claim originally filed were abandoned and recovery was

sought upon the basis of the statement filed after the expiration of the statutory period of limitation. The court held that the latter did not constitute an amendment of the claim originally filed and came too late although it also found that the Commissioner had considered the late contention on its merits. Judgment was entered in favor of the United States. The Circuit Court of Appeals reversed, holding the statement filed as an amendment was germane to the original refund claim and that both were grounded in substantially the same facts.[2] We granted certiorari to resolve alleged conflict of decision.

In view of what has been said in *United States* v. *Andrews* (*supra*), it is necessary only to inquire in the instant case whether the original claim was specific and the so-called amendment completely shifted to a totally different ground for refund.

The transactions of the taxpayer which gave rise to its tax liability were exceedingly simple due to the fact that it had resorted to distribution of all the oil produced, partly to its lessors as royalty and partly to its stockholders in return for their advancing the corporate expenses. If it was liable for income tax the method of calculation it adopted was apparently the correct one.

Claim for refund was not filed until 1929 when the statute of limitations had barred refund of all payments made by the respondent except the amount of the additional assessment paid in 1925. In an effort to recover that much of the tax paid for the year 1919 the claim set out two grounds: first, that a deduction of $12,500 should be allowed for amortization of a drilling contract which the company had and, second, that its invested capital should have been increased by more than $100,000 to embrace the unrecovered cost of this drilling contract. The claim directed the Commissioner's attention to these two items only. It gave him no notice that the taxpayer claimed not to have been in receipt of any income whatever for the taxable year. The documents would not naturally suggest any such claim for, as in *United States* v. *Henry Prentiss & Co., Inc.*, 288 U. S. 73, the ground asserted in the later demand was totally inconsistent with and involved a negation of that specified in the claim for refund. Before the Commissioner had acted on the claim for refund the respondent, in an effort to evidence continuity and identity of claim, filed its so-called statement perfecting and completing the claim for refund. This abandoned the grounds

[2] 89 F. (2d) 749.

originally alleged in support of the claim. The position taken in the amendment was that the taxpayer had no income whatever and that if the Commissioner refused refund on the basis of a rejection of the deductions claimed from gross income in the original demand, he should find that the taxpayer's operations were not productive of any income to it.

In defense of the amendment the respondent says that it was claiming only the $3,105.65 paid in 1929 pursuant to the additional assessment; that in no event could it recover the entire tax paid; that if the original grounds for claiming refund of payment of the sum in question had been held valid this would have been sufficient to require the refund of the whole of the sum, and the amended claim would have no different result. This contention is advanced to persuade us that, after all, the cause of action in this case was for the recovery of $3,105.65 as money had and received to the respondent's use, and that, therefore, there is no departure and no new cause of action asserted by the amendment. To adopt this view would be to disregard what was said in earlier cases to the effect that the analogies of pleading must not be pressed to such an extent as to disregard the realities of administrative procedure. The claim as filed called for no investigation of the question whether the taxpayer's transactions gave rise to income. On the contrary, the grounds advanced assumed the receipt of income. The claim being thus specific the Commissioner was entitled to take it at face value and to examine only the points to which it directed his attention. It would be to disregard the natural course of procedure in the Bureau to suppose that grounds thus specifically asserted would direct attention to another at war with them.

The respondent urges that although the amendment was not timely, the Commissioner, in considering the merits of the position taken therein, waived any objection which might have been available to him that this position was not disclosed in the original claim. The contention is bottomed upon the fact that, in his letter of August 12, 1929, the Commissioner refers to the reasons advanced in the untimely statement. The argument confuses the power of the Commissioner to disregard a statutory mandate with his undoubted power to waive the requirements of the Treasury regulations. The distinction was pointed out in *United States* v. *Memphis Cotton Oil Co.*, 288 U. S. 62, 71, wherein it was said: "The line of division must be kept a sharp one between the function of a stat-

ute requiring the presence of a claim within a given period of time, and the function of a regulation making provision as to form. The function of the statute, like that of limitations generally, is to give protection against stale demands. The function of the regulation is to facilitate research." In the cited case, and others decided at about the same time, we held that, while the Commissioner might have enforced the regulation and rejected a claim for failure to comply with it in omitting to state with particularity the grounds on which the claim was based, he was not bound to do so, but might waive the requirement of the regulation and consider a general claim on its merits. This was far from holding that after the period set by the statute for the filing of claims he had power to accept and act upon claims that complied with or violated his regulations. *Tucker* v. *Alexander*, 275 U. S. 228, cited by the respondent, is clearly distinguishable. There a timely claim was filed and disallowed. It alleged two specific grounds for refund. Suit was brought to recover the alleged overpayment and again reliance was placed on the same two specific grounds. At the trial of the action, and within the period of limitations, the taxpayer abandoned the grounds alleged in its claim and complaint and asserted a new ground. Counsel for the government stated that the new question brought forward was the only one involved in the case and stipulated as to the amount to be recovered if the trial court should hold in favor of the taxpayer on this new ground. The court did so. On appeal the government, for the first time, raised the point of the insufficiency of the claim for refund and the Court of Appeals held that the new basis for the claim did not sustain recovery because reference had not been made to it in the refund claim. This court decided that there was an express waiver as to the form and contents of the claim and that counsel representing the government had power, prior to the expiration of the period of limitation, to waive the objection that the supposed basis for refund was not disclosed in the claim. In so holding the court adverted to the fact that the Commissioner was not deceived or misled by the deficiency of the claim and that it was in the interest of justice that in the circumstances the claimant be not remitted to the resort of filing a new claim and pursuing it through the Bureau and the courts. The opinion expressly recognized that no officer of the government has power to waive the statute of limitations and cited, in support of the proposition, *Finn* v. *United States*, 123 U. S. 227, saying: "Such

waivers, if allowed, would defeat the only purpose of the statute and impose a liability upon the United States which otherwise would not exist—consequences which do not attach to the waiver here."

The statement filed after the period for filing claims had expired was not a permissible amendment of the original claim presented. It was a new claim untimely filed and the Commissioner was without power, under the statute, to consider it.

The judgment is

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.